IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HUNG N. DO, Petitioner, v. MATHEW CATES, Warden, Respondent.	No. C 14-3549 LHK (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent was ordered to show cause why the petition should not be granted. Respondent has filed an answer, and petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief, and DENIES the petition.

PROCEDURAL HISTORY

On June 6, 2008, petitioner was charged with two counts of murder. The information also alleged personal use of a deadly weapon, and a multiple murder special circumstance. On May 11, 2011, after an 11-day jury trial, the jury found petitioner guilty of both counts, and found true the special allegations. On July 11, 2011, the trial court sentenced petitioner to a term of life without the possibility of parole, plus two years.

On May 21, 2013, the California Court of Appeal affirmed. On August 14, 2013, the

California Supreme Court denied review.

Petitioner filed the underlying federal habeas petition on August 6, 2014.

BACKGROUND

The following facts are taken from the Court of Appeal's opinion in *People v. Do*, No. H037180, 2013 WL 2263986 (Cal. App. May 21, 2013).

> In May 1991, a witness discovered the bodies of Cathy and her son, Michael Bui, on the living room floor of her apartment. Police arrested no suspects for about 16 years, until 2007, after a computerized search of the CODIS [FN1] database showed that a blood sample from the crime scene contained defendant's DNA. Defendant was arrested and charged with murder in December 2007.
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> FN1. CODIS (Combined DNA Index System) is a nationwide database connecting federal, state, and local DNA databanks.
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> At the time of her death, Cathy was a 25-year-old mother of three young children. Her youngest son, Michael Bui, was born in 1988, two or three years before the killing. The record contains no precise evidence of who fathered Michael, but Jason Nguyen, Cathy's ex-husband, fathered her other two children.
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> *I. Defendant's Relationship to the Victims and Witnesses*
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> Defendant Hung Ngoc Do was born in 1958, and emigrated from Vietnam to the United States in 1981. At the time of the killings, he was 33 years old and was working as a machinist. He knew Cathy through his friendship with Cathy's ex-husband Jason Nguyen ("Jason").
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> Defendant met Jason and Cathy around 1981, when they lived in the same apartment complex. Jason, a witness for the prosecution, testified that defendant was his "best friend," and Jason considered him family. Defendant spent much time with Jason, Cathy, and Jason's brothers. They went to each others' homes, and to cafés and clubs where they danced and partied together. Defendant sometimes danced with Cathy.
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> Jason testified that he never observed any evidence of a romantic relationship between Cathy and defendant. Jason's sister also saw no evidence of a romantic relationship between Cathy and the defendant. The detective who originally investigated the crime testified that he had interviewed more than two-dozen witnesses, none of whom said defendant had any romantic interest in Cathy.
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> *II. Defendant's Marriage to and Separation from Ngoc Nu Nguyen*
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> In 1988, defendant married Ngoc Nu Nguyen ("Ngoc"). Around 1990 or 1991, they tried to start a family by engaging in frequent intercourse, but she required medical help. Ngoc testified that she wanted to have a child because she thought it would stabilize their marriage. After several months of effort, she became pregnant. Their daughter was born in May 1992. Ngoc testified that she did not notice any change in defendant's behavior around May 1991, and

she did not suspect him of infidelity. She also bore a son by defendant in 1994.

Ngoc, testifying for the defense, stated that she filed for legal separation in 1992, but she continued to live with defendant until 1994. In 1993, she called the police after an argument with defendant in which he tried to take their daughter from her. Ngoc testified that defendant did not strike her.

In 1999, they physically separated. She again called police in 2000 when defendant came to her mobile home and tried to take their son to a family party. She testified that defendant did not strike her, but that he tried to grab the phone away from her, and it hit her on the face. She told the police that he hit her and injured her face, but she testified that it "just like hurt a little bit" and there was no evidence of injury when the police arrived.

On cross-examination, she testified that she had smelled alcohol on defendant and she told the police he had been drinking. The prosecutor pressed her on whether defendant hit her and threatened her:

"[Question:] Isn't it, in fact, true that on the day this happened, that's not all he did? He hit you in the face, he hit you in the head, he took the phone away, he pulled the phone out of its socket in the wall, he went and pulled another phone out of the socket in the wall, and then he told you that if you call the police, he would come back and kill you?

"[Answer:] I don't remember that.

"[Question:] That's what you told the police.

"[Answer:] This may be. At that time, I really don't want him to get into my house anymore."

Ngoc also admitted that in 1991 and 1992 defendant disappeared for days or weeks at a time, and she did not know where he was.

Defendant denied that he struck his wife in 1993. On cross-examination, he admitted pleading guilty to willfully inflicting a corporal injury resulting in a traumatic condition. He testified that he pleaded guilty because he was asked to plead guilty. The prosecutor, questioning defendant about his conviction in 2000, accused him of lying to the police to get out of trouble. Defendant testified that he told police he did not beat his wife, but he admitted pleading guilty to battery. Again, defendant testified that he pleaded guilty because he was asked to plead guilty. When asked whether he told police he had threatened to kill his wife, defendant testified that he could not recall because he "drank a little bit of beer." He denied that he slapped his wife or struck her on top of the head.

III. Defendant's Visit to Cathy's Apartment in 1991

Defendant denied having any involvement with the killings. He testified that he once visited Cathy's apartment for about an hour in 1991. Cathy had invited him because they were friends. She gave him a glass of water and a sandwich. He testified that he suffered a bloody nose during the visit, and it "seems like" he washed his hands in the bathroom sink and wiped his hands with a towel. He could not recall whether he touched any doorknobs, and he did not know how his blood got on other locations in the apartment.

Jason testified that he, his brother, and defendant had visited Cathy's apartment prior to her death to visit his children and Cathy's youngest child. Jason did not see defendant suffer any injury or bloody nose, and he further testified that defendant stayed around the living room for the entire visit. Jason saw no evidence that either Cathy or the defendant were angry with the other.

IV. Crime Scene Evidence

Police testified that the bodies of both Cathy and Michael were lying face down and bloody. Both died from multiple stab wounds, but the record contains no evidence of who died first. A large pool of blood had collected under Cathy's body, and the police found large bloodstains in various locations in the living room around the bodies. Crime scene investigators also collected blood samples from numerous locations throughout the apartment, including the kitchen, the bedrooms and a hallway bathroom.

Dr. Joseph O'Hara, a forensic pathologist, testified for the prosecution based on a written report by the coroner who examined the bodies. The coroner identified 22 stab wounds and 13 incised wounds on Cathy's body. [FN2.] The coroner located two stab wounds on the face, two on the front of the neck, five on the back of the neck, twelve on the back, and one on the chest. Of the wounds the coroner measured, he estimated a depth of three inches. The coroner examined some of the wounds to determine what kind of blade had been used. For a majority of these wounds, he determined they had been made with a single-edged blade. However, O'Hara testified that he could not tell whether the wounds were inflicted by a kitchen knife or a hunting knife.

> FN2. An incised wound is a superficial, sharp-force injury to the skin that is longer than it is deep. A stab wound is deeper than it is wide, consistent with a knife plunged straight into the skin.

O'Hara testified that not all of the stab wounds were immediately lethal. Several were nonlethal, such that Cathy would have survived if she had received medical treatment and did not die from infection. However, both of her carotid arteries and jugular veins had been severed, and her lungs had been punctured. O'Hara testified that the carotids are high-pressure arteries, and that a lot of blood would have flowed out of Cathy's body. He estimated that Cathy would have died in no more than one or two minutes, but she would have been able to fight back through the infliction of most of the wounds. The record contains no evidence of the order in which the stab wounds were inflicted.

The coroner located numerous incised wounds consistent with the use of a knife, including wounds on her upper thigh and lower legs, her abdomen, her left hand, and her groin. O'Hara testified that he could not tell whether the wounds were created with a single-edged blade, a double-edged knife, or a serrated knife. The coroner also identified several "blunt force" injuries, a category that generally includes abrasions, contusions, and lacerations. She had numerous scratches or lacerations on her extremities, and a tear in the skin of her scalp. O'Hara testified that it was possible the wounds on her arms and hands were defensive, or "fighting back" wounds.

Crime scene investigators found large quantities of blood and large bloodstains in the living room and kitchen area near the bodies. A substantial amount of blood had collected under Cathy's body. Another pool of blood was found near Cathy's body on the floor between the kitchen and the living room.

On the wall just south of Michael's body, investigators found a large bloodstain two to three feet high. An investigator testified that, given the quantity of blood and the height of the stain, it was consistent with Cathy's body being up against the wall while she was crawling or rolling, but not on her feet. A similar stain at the same approximate height was found on a closet door by the entryway, several feet west of Michael's body. An investigator testified that this stain was also consistent with Cathy's body being pushed or rubbing up against the area. Another significant blood stain was found on a wooden plant stand adjacent to the large wall stain and Michael's body. A smaller bloodstain was found on the doorknob to the front door and the area around the doorknob adjacent to the entryway closet.

Investigators found numerous smaller bloodstains throughout the apartment. Some of these bloodstains contained DNA matching defendant's DNA. A police officer testified that it is common for an attacker with a knife to cut himself, particularly when the knife has no guard on the handle. Bloodstains containing defendant's DNA were found as follows:

Cathy was wearing nylon stockings at the time of her death. The stockings contained multiple bloodstains. Crime lab analysts found defendant's DNA in at least one of the stains.

Investigators found blood droplets containing defendant's DNA on the wheel of a child's bicycle in the living room.

Defendant was a major donor of the DNA found in a bloodswipe on the edge of a hallway closet door.

Defendant was the single source of blood swiped on a doorknob on the exterior side of the master bedroom door.

Investigators swabbed a bloodstain on the area around the hallway bathroom sink. Defendant was a major contributor to the DNA, and Cathy was a minor contributor.

Investigators found a bloodstain on a towel next to the hallway bathroom sink. Defendant was a major contributor to the DNA in the stain, and Cathy was a minor contributor.

Investigators found a transfer bloodstain on a teddy bear. [FN3.] Cathy was the major contributor to the DNA in the stain, and defendant was a potential minor contributor.

> FN3. Investigators found at least two teddy bears in the apartment. They found one on a shelf in the living room. They found another in a box in a child's bedroom. Photos show that both contained bloodstains. The record is ambiguous as to which was the source of the DNA test.

Defendant was the single source of a diluted bloodstain on a dust ruffle on the bed in the master bedroom.

Additionally, investigators found a broken fingernail on the floor a few feet from Michael's body. Cathy was the major contributor to the DNA on the fingernail, and defendant was a potential minor contributor.

> Investigators used luminol, a chemical that glows on contact with blood, to detect trace amounts of blood not visible to the human eye. In addition to blood on the floor of the living room and kitchen area, the luminol revealed blood (1) on the carpet of the master bedroom; (2) in the middle bedroom, in a pattern leading from the door to a box in a corner where one of the teddy bears was found; (3) on the floor of the hallway bathroom; and (4) on the floor of the hallway leading from the living rooms to the bedrooms. The record contains no evidence of any tests to determine whose blood was found in any of these locations. One investigator testified that the blood in the hallway could have been tracked by the investigators, or by the initial police officers on the scene. [FN4.]
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> > FN4. The initial police officer on the scene testified that he entered the apartment through the northwest bedroom and walked down the hall towards the living room. After exiting the apartment, he and another officer re-entered the apartment to check for persons in each bedroom. At the preliminary hearing, Khanh La, whom Cathy had been dating the year before her death, testified that he walked down the hallway and into the hallway bathroom after discovering the bodies in the living room.
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> Investigators found a multitude of knives in the kitchen. A knife block on the kitchen counter held ten knives with matching black handles. Two slots in the block were missing knives; one slot appeared to be designed for a smaller knife, and the other slot for a larger knife. The smaller black-handled knife was found in a kitchen drawer with other knives. The larger black-handled knife had been placed in a dish-drying rack next to the kitchen sink. A larger white-handled knife lay on the edge of the sink next to the dish-drying rack. The record contains no evidence of forensic tests on any of the knives.
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> In the master bedroom, investigators found a number of Cathy's personal effects lying on the bed, including photographs, insurance papers, and letters. An investigator testified that it appeared someone had ransacked the room and pulled the items out of drawers. The investigator opined that the killer was looking for evidence that would connect him to the crime, particularly since the killer ignored a number of valuable items in plain view.
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> In the kitchen, investigators found food in various stages of preparation, including a bowl of snails, a bowl of cut-up vegetables, a bowl of noodles, and a pot with some cooked meat. On the dining room table next to the kitchen, investigators found a placemat with a partially-eaten piece of pizza, a cup with orange juice, and a piece of a candy bar on a paper towel. On the kitchen counter, next to the white-handled knife by the sink, investigators found an empty drinking glass. A fingerprint from the glass matched defendant's fingerprint.

Do, 2013 WL 2263986, at *1-*5.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The

petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the U.S. Supreme Court as of the time of the state court decision. *Id.* at 412. Clearly established federal law is defined as "the governing legal principle or principles set forth by the [United States] Supreme Court." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

DISCUSSION

Petitioner raises two claims in his federal habeas petition. First, petitioner alleges that there was insufficient evidence for the jury to find that the murder of Cathy Nguyen was premeditated or deliberate. Second, petitioner alleges that admission of his prior domestic

violence convictions violated his right to due process. The court addresses each claim in turn.

A. Insufficient Evidence

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. *See Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992); *see, e.g.*, *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam) ("the only question under *Jackson* [*v. Virginia*, 443 U.S. 307 (1979)], is whether [the jury's finding of guilt] was so insupportable as to fall below the threshold of bare rationality"). The federal court "determines only whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Payne*, 982 F.2d at 338 (quoting *Jackson*, 443 U.S. at 319). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt, has there been a due process violation. *Jackson*, 443 U.S. at 324. To grant relief, under the AEDPA, a federal habeas court must conclude that "the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." *Boyer v. Belleque*, 659 F.3d 957, 964-65 (9th Cir. 2011).

The California Court of Appeal rejected petitioner's claim.

> "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)
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> Defendant contends the evidence is insufficient to support a finding of deliberation and premeditation under *People v. Anderson* (1968) 70 Cal.2d 15. Anderson had been living with a woman for about eight months when he

brutally stabbed her 10-year-old daughter to death. (*Id.* at p. 19.) He inflicted more than 60 stab wounds over the girl's entire body, including a post-mortem wound from her rectum to her vagina. (*Id.* at pp. 21-22.) Her dress had been torn off, and the crotch of her panties had been ripped out. (*Id.* at p. 21.) The prosecution contended the murder was sexually motivated. (*Id.* at p. 22.) Our high court, however, found insufficient evidence to support first degree murder. It reduced Anderson's sentence to second degree murder, notwithstanding the heinous nature of the crime. (*Id.* at p. 23.) It held that "the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." (*Id.* at pp. 23-24.)

The *Anderson* court identified three categories of evidence courts have used to assess deliberation and premeditation: (1) "planning activity," or facts about how and what the defendant did before the killing that show the defendant was engaged in activity directed toward, and intended to result in, the killing; (2) facts about the defendant's prior relationship to or conduct with the victim from which the jury could reasonably infer a "motive" to kill; and (3) "manner of killing," or facts showing that the manner of killing was so particular and exacting that the defendant acted according to a "preconceived design." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) (Hereafter, "the *Anderson* factors.") The court further observed that courts typically sustain first degree murder verdicts when there is evidence of all three factors, or at least extremely strong evidence of type (1), or evidence of type (2) in conjunction with type (1) or type (3). (*Id.* p. at 27.)

The court held that the evidence of Anderson's conduct was insufficient to show any of these three factors. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) In assessing the evidence of type (1), "planning" evidence, the court contrasted the facts with those in *People v. Hillery* (1965) 62 Cal.2d 692, in which the court found the evidence was sufficient to support first degree murder. In *Hillery*, the killer surreptitiously entered the victim's home, took measures to silence the victim, and carried her to a location where they were unlikely to be discovered. (*Id.* at p. 704.) By contrast, Anderson had taken none of these steps, and the court found no evidence of a relationship between Anderson and the victim from which the jury could infer a motive. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 33.) Regarding the manner of killing, the defendant in *Hillery* had stabbed his victim directly in her chest. (*People v. Hillery*, *supra*, 62 Cal.2d at 704.) The *Anderson* court noted that this evidenced a deliberate intention to kill, as compared with the "'indiscriminate' multiple attack of both superficial and severe wounds" that Anderson inflicted. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) The court found the manner of killing in *Anderson* more like that in *People v. Craig* (1957) 49 Cal.2d 313, in which the manner of death, although violent and brutal, could not support an inference that the wounds were inflicted "deliberately and in a particular manner." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 33.)

More recently, the California Supreme Court has clarified the application of the *Anderson* factors. It noted that "[t]he *Anderson* guidelines are descriptive, not normative. [¶] The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) "Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations.

It did not refashion the elements of first degree murder or alter the substantive law of murder in any way." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) In *People v. Perez*, *supra*, 2 Cal.4th 1117, the court found the evidence sufficient to support a verdict of first degree murder on facts similar to those here. (*Id.* at p. 1125.) Perez had known the victim since high school. (*Id.* at p. 1122.) He stabbed her to death in her home shortly after her husband left for work. (*Id.* at p. 1120.) The front door of the home was found ajar, and a broken dish with dog food was found near the victim's body. (*Id.* at p. 1121.) Evidence of a violent struggle was found throughout the house. (*Id.* at pp. 1121-1122.) The victim's body suffered 26 stab wounds and 12 puncture wounds to her head, face, neck, and carotid artery. (*Id.* at p. 1122.) She also suffered defensive wounds to her forearms, wrists, and hands, in addition to blunt force injuries to her eyes, nose, and lips. (*Ibid.*) Perez used two knives; one was found lying broken near the victim's body. (*Ibid.*) He cut his hands during the attack. (*Id.* at p. 1123.) In the master bedroom, dresser drawers and jewelry boxes were found open. (*Id.* at p. 1121.)

The *Perez* court found that the jury could have inferred the following events from the evidence: Perez entered the victim's home surreptitiously while she was warming up her car. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1126.) He surprised her, causing her to drop the dish containing the dog food. (*Ibid.*) He began beating her about the head and neck with his fists. (*Ibid.*) He retrieved a knife from the kitchen, which broke during the attack and cut his hands. (*Ibid.*) He then retrieved a second knife to complete the killing. (*Ibid.*)

The court found evidence of planning in Perez's surreptitious entry into the home. (*Ibid.*) Having surprised the victim, Perez then had a motive to kill her to prevent her from identifying him. (*Id.* at pp. 1126-1127.) The manner of killing, in which defendant paused to retrieve a second knife, also demonstrated premeditation and deliberation. (*Id.* p. at 1127.) The court also noted that Perez's conduct after the killing – searching through dresser drawers and jewelry boxes – appeared to be "inconsistent with a state of mind that would have produced a rash, impulsive killing." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1128.)

We find that the facts of this case bear a greater resemblance to those of *Perez* than those of *Anderson*. Though the evidence of planning and motive is scant – perhaps due to the 16-year delay in identifying and arresting the defendant – the jury could have inferred premeditation and deliberation from the manner of killing.

First, the evidence is consistent with a violent struggle between defendant and Cathy. Respondent argues that the wounds were not inflicted in rapid succession because defendant pursued Cathy through the apartment as she physically struggled and fought for her life. Although the record does not support the inference that defendant pursued Cathy throughout the apartment, the bloodstains on the south wall suggest that she may have been trapped or pushed up against that wall. Together with the bloodstain on the entryway closet door, the wounds on Cathy's extremities, and the broken fingernail found near her body, the jury could have inferred that Cathy had engaged in a prolonged attempt to defend herself and Michael. The bloodstains around the entryway area, together with the blood on the front door doorknob, are consistent with an attempt by Cathy to escape from defendant. Under either scenario, some period of time must have elapsed between the start of the attack and Cathy's loss of volition. The jury could reasonably infer that the passage of

> time, combined with resistance from the victim, required defendant to exhibit a sufficient degree of deliberation and intent to kill to convict defendant of first degree murder.
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> The sheer number of wounds on Cathy's body – some of which were likely fatal by themselves – is further evidence of defendant's intent to kill. (*People v. Elliot* (2005) 37 Cal.4th 453, 471 [three potentially lethal knife wounds, together with numerous other stab and slash wounds, implied a preconceived design to kill]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659 [sheer number of wounds supported a finding of deliberation].)
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> Respondent argues that defendant "chose not to relent until he delivered the lethal blows to Cathy's chest and neck." The record does not support this claim; there is no evidence of the order in which defendant inflicted the wounds. Nonetheless, defendant inflicted a majority of the stab wounds to Cathy's upper torso. In particular, defendant stabbed Cathy in the neck seven times, and he stabbed her once in the left breast directly in front of the heart. It is common knowledge that the neck contains life-critical blood vessels, such as the carotid arteries and jugular veins, both of which defendant severed. The jury may have inferred that defendant was aiming the knife at her neck and heart with the deliberate intent to kill her by severing critical blood vessels or stabbing her heart. This evidence supports a finding of deliberation.
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> Finally, evidence of motive is not altogether absent. As in *Perez*, defendant had known the victim prior to the crime. The jury could have inferred that defendant killed Cathy to prevent her from identifying him after initially assaulting her or Michael. The jury could also have inferred that defendant killed Cathy to gain access to her personal effects, found in the ransacked master bedroom. Alternatively, as an investigator opined in his testimony, the jury could have found that defendant was searching for any documents that may have connected him to the victims. In either scenario, the papers and photographs on Cathy's bed, together with the absence of any blood on these items, suggest defendant conducted himself carefully and with purpose such that his post-killing conduct was inconsistent with a state of mind that would have produced a rash, impulsive killing. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1128.)
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> Given the totality of the record, a rational jury could have found beyond a reasonable doubt that the defendant murdered Cathy with deliberation and premeditation.

Do, 2013 WL 2263986, at *5-*8.

Petitioner's argument that the evidence required to establish premeditation and deliberation was insufficient under state law was rejected by the California state courts. To the extent petitioner argues that the California Court of Appeal was incorrect in its analysis and interpretation of state law, he is not entitled to habeas relief. The *Jackson* standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Jackson*, 443 U.S. at 324 n.16; *see, e.g.*, *Boyer*, 659 F.3d at 968 (concluding it was not

unreasonable, in light of Oregon case law, for Oregon court to conclude that a rational jury could find beyond a reasonable doubt that petitioner intended to kill his victim based on proof that he anally penetrated several victims with knowledge that he could infect them with AIDS). The California Court of Appeal's ruling on the state law issue is binding on this court.

However, "the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman*, 132 S. Ct. at 2064. Here, petitioner has not shown that the California Court of Appeal was objectively unreasonable in finding sufficient evidence to support the elements of premeditation and deliberation in light of the state law, and the high bar for the *Jackson* claim.

Petitioner argues that applying the *Anderson* factors does not establish premeditation and deliberation. The argument has some weight because the only witnesses who could provide a motive were petitioner's victims, and there was no non-circumstantial evidence of planning. However, California courts have made it clear that the *Anderson* factors are to be used only for guidance, and do not provide concrete prerequisites for proving premeditation and deliberation in each and every case, nor are they required to be present in some special combination or accorded a particular weight. *See Mayfield*, 14 Cal.4th at 767.

Based on the evidence presented at trial, a rational trier of fact could have concluded that petitioner premeditated and deliberated Cathy's murder. The evidence of numerous bloodstains throughout the apartment, and especially on the walls and closet door, was consistent with Cathy's body being pushed or rubbing up against those areas. From that, as well as Cathy's possible defense wounds, the jury could reasonably infer that Cathy was trying to defend herself from petitioner, and that she was trying to escape from petitioner. *See, e.g.*, *Perez*, 2 Cal.4th at 1127-28 (recognizing that evidence led to the inference that some period of time elapsed between first set and second set of knife wounds, and that time elapse, in conjunction with the number of wounds inflicted as well as the manner of killing, could have led the jury to infer premeditation and deliberation). The jury could have inferred that while Cathy was trying to escape or defend herself, petitioner reflected on the decision to kill her. Thus, the killing was not the result of "mere unconsidered or rash impulse." *People v. Elliot*, 37 Cal.4th 453, 471 (2005).

In addition, Cathy had 22 stab wounds and 13 incised wounds on her body. Although not all of the stab wounds were immediately lethal, "both of her carotid arteries and jugular veins had been severed, and her lungs had been punctured." *Do*, 2013 WL 2263986, at *3. A reasonable jury could infer that the number of wounds, including multiple lethal ones, suggested a preconceived design to kill. *See, e.g.*, *Elliot*, 37 Cal.4th at 471. Finally, that Cathy's bedroom was ransacked could lead a reasonable jury to infer that petitioner went through Cathy's personal effects without leaving a trace of blood on any of the items. As the California Court of Appeal observed, that evidence could suggest that petitioner "conducted himself carefully and with purpose such that his post-killing conduct was inconsistent with a state of mind that would have produced a rash, impulsive killing." *Do*, 2013 WL 2263986, at *8. Thus, the evidence was sufficient to support a verdict of premeditated and deliberate first-degree murder.

For the above reasons, the California Court of Appeal decision was not an unreasonable application of *Jackson*, and petitioner is not entitled to federal habeas relief on this claim.

B. Admission of prior convictions

Petitioner claims that his right to due process was violated when the trial court admitted evidence of petitioner's two prior misdemeanor domestic violence convictions in 1993 and 2000, for the purpose of impeachment. Petitioner argues that the admission of these prior convictions should have been excluded as propensity evidence, and as overly prejudicial.

The California Court of Appeal rejected petitioner's claim under state and federal law. It concluded that the trial court did not violate petitioner's federal due process rights because the prior convictions were explicitly not admitted to show propensity or character, but merely for the limited scope of impeachment. *Do*, 2013 WL 2263986, at *11.

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). The U.S. Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). In

fact, the U.S. Supreme Court has expressly left open the question of whether admission of propensity evidence violates due process. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991). Based on the U.S. Supreme Court's reservation of this issue as an "open question," the Ninth Circuit has held that a petitioner's due process right concerning the admission of propensity evidence is not clearly established, as required by AEDPA. *See Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006); *accord Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (reaffirming *Alberni*, and stating that there is "no Supreme Court precedent establishing that admission of propensity evidence, as here, to lend credibility to a sex victim's allegations, and thus indisputably relevant to the crimes charged, is unconstitutional."). As federal courts may grant habeas relief only if a state court decision is contrary to, or an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court, *see* 28 U.S.C. § 2254(d)(1), there can be no federal habeas relief on this claim because there is no clearly established federal law. Therefore, the California Court of Appeal's rejection of such a claim cannot be grounds for federal habeas relief. *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008).

Alternatively, even assuming there was a clearly established law that a petitioner had a due process right regarding the admission of propensity evidence, the due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Here, both petitioner and his ex-wife denied that petitioner had struck her in both 1993 and 2000. Petitioner's misdemeanor convictions were used to impeach both petitioner and his ex-wife. The admission of these convictions for impeachment purposes, rather than to show conduct in conformity therewith, was not so inflammatory or emotionally charged so as to violate due process. *See id.* at 920-21.

In sum, because the United States Supreme Court has expressly left open the question presented in the petition, the California Court of Appeal's rejection of petitioner's claim that the

trial court's admission of his prior two misdemeanor convictions violated his due process rights was not contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law. Accordingly, the state court's decision was not contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law.

CONCLUSION

The petition for writ of habeas corpus is DENIED.

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

The clerk is instructed to enter judgment in favor of respondent, terminate all pending motions, and close the file.

IT IS SO ORDERED.

DATED: 12/14/2015

Lucy H. Koh
LUCY H. KOH
United States District Judge